No. 85-1714 (3)

FILED
MAY 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

KENNETH PAYNE and MARGARET PAYNE,
his wife,

Appellants,

vs.

LARRY MOUNT, Sheriff of Whatcom
County and WHATCOM COUNTY,

Appellees,

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

MOTION OF APPELLEE TO DISMISS FOR FAILURE TO COMPLY WITH THE RULES OF THE UNITED STATES SUPREME COURT, FAILURE TO PROPERLY AND TIMELY RAISE A FEDERAL QUESTION AND MOTION TO AFFIRM JUDGMENT BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS

GENE R. MOSES
Chief Civil Deputy
Prosecuting Attorney
Office of the Prosecuting
Attorney
Whatcom County Courthouse
311 Grand Avenue
Bellingham, WA 98225
(206) 676-6784

Counsel for Appellees

24 pp

TABLE OF CONTENTS

Statement of Facts . . . . . 1.

Argument . . . . . 5.

A. THE APPEAL WAS NOT TIMELY DOCKETED IN CONFORMITY WITH THE RULES OF THE UNITED STATES SUPREME COURT . . . 5.

B. NO FEDERAL QUESTION WAS PROPERLY AND/OR TIMELY RAISED . . . . . 10.

C. THE JUDGMENT WAS BASED ON INDEPENDENT AND ADEQUATE STATE GROUNDS . . . . . 14.

Conclusion . . . . . 17.

TABLE OF AUTHORITIES

Table of Cases

Aero Mayflower Transit Co. vs. United States, 409 U.S. 905 (1972) . . . . . 8.

Beck vs. Washington, 369 U.S. 541 (1962) . . . . . 13.

Black vs. Cutter Laboratories, 76 S.Ct. 824, 351 U.S. 292, 100 L.Ed. 1188 (1956), rehearing denied 77 S.Ct. 21 352 U.S. 859, 1 L.Ed.2d 69 . . . . . 15.

Bowe vs. Scott, 233 U.S. 658, (1914) . . . . . 12.

Capital City Dairy Co. vs. Ohio, 183 U.S. 238 (1902) . . . . . 12.

Dewey vs. Des Moines, 173 U.S. 193 (1899) . . . . . 15.

Durley vs. Mayo, 76 S.Ct. 806, 351 U.S. 277, 100 L.Ed. 1178 (1956), rehearing denied 77 S.Ct. 22, 352 U.S. 859, 1 L.Ed.2d 69 . . . . . 15.

Harding vs. Illinois, 196 U.S. 78 (1904) . . . . . 11.

Herndon vs. Georgia, 295 U.S. 441 (1935). . . . . 11.

Herb vs. Pitcairn, 324 U.S. 117 . . . . . 15.

Hill vs. California, 401 U.S. 797 (1971). . . . . 12.

Hutter vs. Korzen, 409 U.S. 905 (1972) . . . . . 8.

Landry vs. Boyle, 393 U.S. 220 (1968) . . . . . 8, 9.

McGoldrick vs. Compagnie Generale, 309 U.S. 430 (1940). . . 12.

Morrison vs. Watson, 154 U.S. 111 . . . . . 15.

Oxley Stave Co. vs. Butler County, 166 U.S. 648 (1897). . . . 12,

Pittsburgh Towing Co. vs. Mississippi Valley Barge Line Co., 385 U.S. 32, (1966). . . 8, 9.

Shapiro vs. Doe, 376 U.S. 488 (197). . . . . 8.

United States vs. Cotton, 397 U.S. 45 (1970) . . . . . 8.

Whitney vs. California, 274 U.S. 357 (1927). . . . . 15.

Washington State Statutes

R.C.W. 7.24.110 . . . . . 10.

R.C.W. 41.14.120 . . . . . 2, 11, 13.

Other Authority

Whatcom County Civil Service
Rules and Regulations

Rule XI APPEALS, Section 2 . . . . 2.

Rule XI APPEALS, Section 3 . . . . 2.

United States Supreme Court
Rules

Rule 10 . . . . . 6.

Rule 12 . . . . . 7.

Rule 16.1. . . . . 1.

No. 85-1714

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

KENNETH PAYNE and MARGARET PAYNE,
his wife,

Appellants,

vs.

LARRY MOUNT, Sheriff of Whatcom
County and WHATCOM COUNTY,

Appellees,

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

MOTION OF APPELLEE TO DISMISS FOR FAILURE TO COMPLY WITH THE RULES OF THE UNITED STATES SUPREME COURT, FAILURE TO PROPERLY AND TIMELY RAISE A FEDERAL QUESTION AND MOTION TO AFFIRM JUDGMENT BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS

GENE R. MOSES
Chief Civil Deputy
Prosecuting Attorney
Office of the Prosecuting
Attorney
Whatcom County Courthouse
311 Grand Avenue
Bellingham, WA 98225
(206) 676-6784

Counsel for Appellees

The Appellees move the Court pursuant to Rule 16.1 to dismiss the appeal herein on the following grounds:

1. The appeal was not timely docketed in conformity with the Rules of the Supreme Court, and/or,

2. The federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; and/or,

3. The Judgment was based on adequate and independent state grounds.

STATEMENT OF FACTS

1. On the 9th day of October, 1981, Appellees discharged Appellant Kenneth Payne from his Civil Service position as a Deputy Sheriff.

2. Appellant Kenneth Payne had ten (10) days to appeal this discharge to the Civil Service Commission. No such appeal was timely filed.

3. On the 3rd day of November, 1981, Appellant Kenneth Payne filed an untimely Notice of Appeal with the Whatcom County Civil Service Commission which was rejected in writing by the Civil Service Commission pursuant to Whatcom County Civil Service Rule XI APPEALS Section 2 and R.C.W. 41.14.120.

4. The rejection of Appellant Kenneth Payne's Notice of Appeal by the Whatcom County Civil Service Commission could have been appealed to Whatcom County Superior Court within thirty (30) days pursuant to Whatcom County Civil Service Rule XI APPEALS Section 3 and R.C.W. 41.14.120. No such appeal was timely filed by Appellant Kenneth Payne or his counsel.

5. On the 8th day of October 1982, Appellant Kenneth Payne's civil action was dismissed by the Whatcom County Superior Court. On the 12th day of November 1982, Appellant Kenneth Payne's Motion for Reconsideration was denied.

6. On the 4th day of November, 1982, Appellant Kenneth Payne appealed the trial court dismissal of his civil action to Division I of the Washington State Court of Appeals.

7. On the 26th day of August, 1985, Division I of the Washington State Court of Appeals affirmed the trial court dismissal.

8. On the 25th day of September, 1985, Appellant Kenneth Payne filed a Petition for Review to the Washington State Supreme Court.

9. On the 8th day of November, 1985, the Washington State Supreme Court denied Appellant Kenneth Payne's Petition for Review without written decision as is customary under the pleading and practice rules of the state of Washington.

10. Appellant Kenneth Payne had ninety (90) days or until the 6th day of February, 1986, to 1) File the Notice of Appeal to the United States Supreme Court; and, 2) Enter an Appearance; and, 3) Pay the docket fee; and, 4) Serve and file the Jurisdictional Statement.

11. Appellant Kenneth Payne filed a Notice of Appeal to the United States Supreme Court on the 31st day of January, 1986.

12. Appellant Kenneth Payne failed to timely file the Jurisdictional Statement and/or otherwise docket the appeal within the ninety (90) day period which expired on the 6th day of February, 1986. Appellant Kenneth Payne sought no extension of the time limitation within which to properly perfect his appeal and all said time limits have expired.

13. Appellant Kenneth Payne filed the Jurisdictional Statement on the 28th day of March, 1986.

14. Appellant Kenneth Payne's Jurisdictional Statement was rejected by the Assistant Clerk of the United States Supreme Court on the 3rd day of April, 1986, as is shown by Exhibit "A" attached hereto.

15. On the 5th day of March, 1986, Appellant Kenneth Payne filed a document entitled "Supplemental Appendix To Jurisdictional Statement."

16. On the 9th day of May, 1986, Appellees first received notice that this appeal had been docketed by way of correspondence from Appellant Kenneth Payne's counsel.

ARGUMENT

A.

THE APPEAL WAS NOT TIMELY DOCKETED IN CONFORMITY WITH THE RULES OF THE UNITED STATES SUPREME COURT.

The Washington State Supreme Court denied Appellant Kenneth Payne's Petition for Review on the 8th day of November, 1985. Thereafter, Appellant Kenneth Payne had ninety (90) days, or until the 6th day of February, 1986, to: 1) Appeal to the United States Supreme Court; and, 2) Enter an appearance; and, 3) Pay the docket fee;

and, 4) Serve and file the Jurisdictional Statement. Appellant Kenneth Payne's Jurisdictional Statement was not filed until 143 days after the entry of the judgment appealed from. Accordingly, Appellant Kenneth Payne's Jurisdictional Statement was filed 53 days after the deadline of February 6, 1986. Appellant Kenneth Payne's Jurisdictional Statement was still defective and it was not until March 5, 1986, that Appellant Kenneth Payne filed a Supplemental Appendix To Jurisdictional Statement.

Appellant Kenneth Payne's appeal has been improperly perfected in violation of Rules 10 and 12. Rule 10 states as follows:

> .1 An appeal to this Court permitted by law shall be taken by filing a notice of appeal in the form, within the time, and at the place prescribed by this rule, and shall be perfected by docketing the case in this Court as provided in Rule 12. (Underlining supplied).

Rule 12 states as follows:

> .1 Not more than 90 days after the entry of the judgment appealed from, it shall be the duty of the appellant to docket the case in the manner set forth in paragraph .3 of this rule, except that in the case of appeals pursuant to 28 U.S. §§ 1252 or 1253, the time limit for docketing shall be 60 days from the filing of the notice of appeal. See 28 U.S.C. §2101(a). The Clerk will refuse to receive any jurisdictional statement in a case in which the notice of appeal has obviously not been timely filed.
>
> (Underlining supplied).
>
> .3 Counsel for the appellant shall enter an appearance, pay the docket fee, and file, with proof of service as prescribed by Rule 28, 40 copies of a printed statement as to jurisdiction, which shall comply in all respects with Rule 15. The case then will be placed on the docket. It shall be the duty of counsel for appellant to notify all

> appellees, on a form supplied by the Clerk, of the date of docketing and of the docket number of the case. Such notice shall be served as required by Rule 2.
>
> (Underlining supplied).

The failure to timely perfect and docket an appeal within the specified time may result in the dismissal of the appeal, either by the court sua sponte or on motion of the appellee, for failure to comply with the rules. See Pittsburgh Towing Co. vs. Mississippi Valley Barge Line Co., 385 U.S. 32, 32-33 (1966), where an appeal was dismissed because of an unexplained tardiness of 22 days in docketing the case; Landry vs. Boyle, 393 U.S. 220 (1968), where the appeal, having been docketed more than three months late, was dismissed "for failure to comply with Rule 13(1);" Shapiro vs. Doe, 396 U.S. 488 (1970) (two days late); Aero Mayflower Transit Co. vs. United States, 409 U.S. 905 (1972), and Hutter vs. Korzen, 409 U.S. 905 (1972) (both 14 days late); United States vs. Cotton, 397 U.S. 45 (1970).

The Court in the Pittsburgh Towing case stated at page 32-37 as follows:

> This Court has been generous in excusing errors of counsel, but if there are to be rules, there must be some limit to our willingness to overlook their violation. While we are inclined to be generous in exercising our discretion to forgive a mistake and waive the consequences of negligence, fairness to other counsel and to parties with business before the court as well as due regard for our own procedures lead us to believe that this case does not warrant our indulgence.

In the Landry case, the jurisdictional statement requested that the late filing be excused since it was the "result of an erroneous interpretation of the Rules of this Court, and through inadvertence and mistake, combined with the pressures of this and other litigation."

Appellant Kenneth Payne, represented by counsel throughout the course of these proceedings, has wholly failed to perfect

his appeal to this court in conformity with the Rules of the United States Supreme Court.

B.

NO FEDERAL QUESTION WAS PROPERLY AND/OR TIMELY RAISED.

The Uniform Declaratory Judgments Act of Washington states, in R.C.W. 7.24.110 as follows:

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be

> unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard.
>
> (Underlining supplied).

Appellant Kenneth Payne failed to serve the Washington State Attorney General, failed to challenge the constitutionality of R.C.W. 41.14.120, failed to challenge the constitutionality of the Whatcom County Civil Service Commission Rules, failed to seek declaratory judgment and failed to raise a constitutional challenge in his opposition to the Motion For Summary Judgment in the trial court. Appellant Kenneth Payne addressed the Constitutional issue for the first time, summarily, in a Supplemental Brief in the Court of Appeals.

Appellant Kenneth Payne's vague reference to the Civil Rights Act, the Constitution and the concepts of Due Process of Law are insufficient to raise and frame a federal question. Herndon vs. Georgia, 295 U.S. 441, 442-43 (1935); Harding vs. Illinois, 196 U.S. 78, 88

(1904); Capital City Dairy Co. vs. Ohio, 183 U.S. 238, 248 (1902). Oxley Stave Co. vs. Butler County, 166 U.S. 648 (1897). Bowe vs. Scott, 233 U.S. 658, 664-65 (1914).

Appellant Kenneth Payne's federal claim cannot be examined in that it has been neither raised, nor considered and solved, by the State Court. McGoldrick vs. Compagnie Generale, 309 U.S. 430, 434 (1940); Hill vs. California, 401 U.S. 797, 805 (1971). The failure of the highest state court to pass upon a federal question raises the presumption that the omission was due to the want of proper presentation of said claim in the state court.

Appellant Kenneth Payne's Brief of Appellants filed with the Washington State Court of Appeals has but a single Assignment of Error which states:

The trial court erred in granting defendant's motion for summary judgment and refusing to grant plaintiff, Kenneth Payne's, requested relief for a preliminary injunction requiring plaintiff to be reinstated to his employment and for reasonable attorney fees and costs.

Appellant failed to raise any federal question in the Assignment of Errors and therefore, has waived the federal issue. Beck vs. Washington, 369 U.S. 541, 553 (1962). Furthermore, Appellant Kenneth Payne admitted that he failed to specifically challenge the constitutionality of R.C.W. 41.14.120 in his Petition For Review to the Washington State Supreme Court wherein he states in section G, ISSUES PRESENTED FOR REVIEW, as follows:

Did appellant Payne's failure to specifically challenge the constitutionality of RCW 41.14.120 in his complaint preclude appellant from receiving judicial review of his dismissal from employment as a Whatcom County Sheriff's Deputy?

Appellant Kenneth Payne, represented by counsel throughout the course of the trial and appellate court proceedings, failed to properly and timely raise a federal question.

C.

THE JUDGMENT WAS BASED ON INDEPENDENT AND ADEQUATE STATE GROUNDS.

The judgment of the Washington State Court of Appeals and the Washington State Supreme Court rest upon state grounds, i.e., failure to exhaust administrative remedies, failure to challenge constitutionality and failure to appeal the initial discharge from employment within the appropriate time limitations.

The United States Supreme Court reviews judgments, not statements in opinions. Herb vs. Pitcairn, 324 U.S. 117, 125-26; Morrison vs. Watson, 154 U.S. 111, 115. The Washington State Court of Appeals based its judgment on an adequate and independent state grounds. Jurisdiction cannot be acquired by Appellant Kenneth Payne's attempt to locate a question deeply hidden in the record which, if it had been raised, would have been of a federal nature. Whitney vs. California, 274 U.S. 357, 362 (1927); Dewey vs. Des Moines, 173 U.S. 193, 199 (1899).

It is respectfully submitted that the Court of Appeals of the State of Washington, that being the highest state court in which a decision could be had in this case, based its decree expressly upon a substantial and sufficient nonfederal ground. The Supreme Court of the United States should not take jurisdiction to review the decree. Black vs. Cutter Laboratories, 76 S.Ct. 824, 351 U.S. 292, 100 L.Ed. 1188 (1956), rehearing denied 77 S.Ct. 21 352 U.S. 859, 1 L.Ed. 2d 69; Durley vs. Mayo, 76 S.Ct. 806, 351 U.S.

277, 100 L.Ed. 1178 (1956), rehearing denied 77 S.Ct. 22, 352 U.S. 859, 1 L.Ed. 2d 69.

CONCLUSION

This appeal is before the United States Supreme Court because of Appellant Kenneth Payne's wholesale failure to adhere to the pleading and practice rules of each and every forum which has heretofore ruled upon this case.

Appellant Kenneth Payne failed to timely appeal his initial discharge to the Civil Service Commission, failed to appeal the rejection of his untimely Notice of Appeal to the Superior Court of Whatcom County, failed to properly and concisely plead the constitutional issues in his original complaint, failed to serve notice of the alleged constitutional issues upon the Washington State Attorney General, failed to raise the constitutional issues in opposition to the Motion For Summary Judgment in the trial court, failed to raise any federal question in the Assignment of Errors in his brief to the

Exhibit "A"

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

April 3, 1986

Henry S. Chapman, Esq.
CHAPMAN, FORBES & PACK
Post Office Box 1478
Everett, WA 98206

RE: Kenneth Payne and Margaret Payne, etc.
v. Larry Mount, Sheriff of Whatcom County etc.

Dear Mr. Chapman:

I return the copies of the jurisdictional statement in the above-entitled case due to the fact that the ninety-days permitted by statute in which to file an appeal in this Court expired on February 6, 1986.

The Clerk of this Court is precluded from accepting for filing any untimely matters submitted in civil cases. I also return your check in the amount of $200.

Very truly yours,

JOSEPH F. SPANIOL, JR., CLERK

By

Edward C.Schade
Assistant Clerk

cdd
Enc.
cc(letter only): Gene R. Moses, Esq.